IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Howard J. Proffitt and William E. Hill,

Plaintiffs in Error,

vs.

United States of America,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The plaintiff in error, hereinafter called the defendant, on the 18th day of April, 1919, was indicted by the grand jury of the United States in and for the Southern District of California, Southern Division, which said grand jury did find and return unto the District Court of the United States in and for the Southern District of California, Southern Division, its indictment against said defendant Howard J. Proffitt for violation of section 37 of the Federal Penal Code, conspiracy to violate the Act of January 17, 1914,

and violation of the Act of January 17, 1914, and thereafter, on the 21st day of April, 1919, the said Howard J. Proffitt appeared in said court and was duly arraigned upon the said indictment and entered his plea of "not guilty" thereto, and thereafter, on the 22d day of April, 1919, the said Howard J. Proffitt filed a demurrer to said indictment [Tr. p. 17], and thereafter, on the 26th day of May, 1919, the said demurrer was duly heard by said court, which duly and regularly made its order overruling said demurrer, to which order of the court then and there made overruling the demurrer of said defendant, the said defendant took an exception, which exception was then and there duly and regularly allowed and entered by the court.

That thereafter, on the 27th day of April, 1919, said cause came on duly and regularly for trial, the Government being represented by Fleet W. Palmer and Gordon Lawson, Esqs., assistant United States district attorneys for the Southern District of California, and the defendant being represented by Frank E. Dominguez, William H. Willis and Milton M. Cohen, Esqs. Thereupon the jury to try the case was duly and regularly impaneled and the trial of the case regularly proceeded. [See Tr. pp. 85-200.]

That thereafter, to-wit, at about the hour of 3:47 o'clock p. m., on the 5th day of June, 1919, the jury returned duly and regularly into court their verdict finding the said defendant Howard J. Proffitt guilty as charged in the first, second, third and fourth counts of the indictment.

That the time for sentencing said defendant was thereupon duly continued by the court until the 17th day of June, 1919, upon which date the said defendant filed in said court his motion for a new trial. That thereupon, on said date, the court duly and regularly heard the motion of said defendant for a new trial and duly and regularly made its order denying said motion, to which ruling the exception of the defendant was duly made and entered, and thereupon, on the same day, said defendant filed his motion in said court in arrest of judgment and the court thereupon heard the same and duly and regularly made its order denying the said motion in arrest of judgment, to which ruling the exception of said defendant was duly made and entered; thereupon the court duly and regularly pronounced sentence upon the defendant Howard J. Proffitt, adjudging that he be imprisoned in the Federal prison at McNeil Island for a period of two years on the first count, two years' imprisonment on the second count with a fine of fifty dollars, two years' imprisonment on the third count with a fine of fifty dollars, and two years' imprisonment on the fourth count with a fine of fifty dollars, said terms of imprisonment to run concurrently. Thereupon, on the said 17th day of June, 1919, the said defendant duly and regularly filed in said court his petition for a writ of error [see Tr. p. 201] and concurrently therewith his assignments of errors [see Tr. pp. 204-219]. That the court at said time allowed said writ of error and fixed a supersedeas bond on appeal in the sum of five thousand dollars to be duly given by the said defendant. That thereafter,

to-wit, on said 17th day of June, 1919, said defendant gave and filed in said court his said bond in the said sum of five thousand dollars [Tr. p. 219], which was duly approved and allowed by said court. [See Tr. p. 222.] That thereupon, on said 17th day of June, 1919, a writ of error duly issued in said cause returnable before the United States Circuit Court of Appeals for the Ninth Circuit. [See Tr. p. 3.] That thereupon, upon said date, citation on said writ of error was duly issued, served upon the United States district attorney and filed with the clerk of said court. [See Tr. p. 2.]

The indictment, demurrer, order overruling the demurrer, petition for writ of error, assignment of errors and the various orders and proceedings of the court referred to herein are fully set out in the printed record on appeal of the clerk on file herein, together with the bill of exceptions [see Tr. pp. 85-200], which was duly allowed and signed and made a part of the records in this case on the first day of November, 1919, by the Honorable Oscar A. Trippet, judge of said court.

The indictment [see Tr. pp. 5-14] contains four counts. The first count is an attempt to charge a conspiracy on the first day of January, 1919, and continuously thereafter up to and including the date of the filing of the indictment, to violate the Act of Congress approved January 17, 1914, and entitled, "AN ACT REGULATING THE MANUFACTURE OF SMOKING OPIUM WITHIN THE UNITED STATES AND FOR OTHER PURPOSES," the indictment setting forth four overt acts alleged to have occurred in furtherance of said con-

spiracy, the second count being an attempt to allege that the defendant did on or about the 8th day of February, 1919, violate the said act, and the third count being an attempt to allege that the defendant did on or about the 21st day of February, 1919, violate said act, and the fourth count being an attempt to allege that the defendant did, on or about the 21st day of February, 1919, violate said act.

There are no overt acts charged under the second, third and fourth counts of said indictment, and the defendant's name does not appear in connection with any of the four overt acts charged under the first count of said indictment.

SPECIFICATIONS OF ERRORS.

Assignment No. I is as follows:

The court erred in overruling the demurrer of the defendant to the indictment in said cause for the following reasons:

(a) That said indictment does not, nor does any count or paragraph thereof, state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or statutes of the United States of America.

(b) That said indictment does not substantially conform to, or comply with, the requirements of section 950 of the Penal Code of the state of California, the state of which this court is holden.

(c) That said indictment does not substantially conform to or comply with the requirements of section 951 of said Penal Code.

(d) That said indictment does not substantially conform to or comply with the requirements of section 952 of said Penal Code.

(e) That more than one offense is charged in said indictment except as provided in section 954 of the Penal Code of the state of California, the state of which this court is holden.

(f) That said indictment is not direct or certain as regards the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.

That said indictment is not direct or certain sufficiently to inform the defendants herein of the particular circumstance of the offense with which they are attempted to be charged.

That said uncertainty consists in the following matters:

That it cannot be ascertained from the second count of said indictment how these demurring defendants did on or about the 8th day of February, 1919, or at any other time, in the Southern Division of the Southern District of California, or at any other place, receive or conceal or did facilitate in the transportation or concealment of opium.

That it cannot be ascertained from a reading of the allegations in the third count of the indictment how these demurring defendants did, on or about the 21st day of February, 1919, or at any other time, in the Southern Division of the Southern District of Cali-

fornia, receive or conceal or did facilitate in the transportation or concealment of opium.

That it cannot be ascertained from a reading of the allegations in the fourth count of the indictment how these demurring defendants did on or about the 21st day of February, 1919, at the city of Los Angeles, county of Los Angeles, state of California, receive or conceal or facilitate in the transportation or concealment of opium.

(g) That second count in the said indictment does not conform to section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(h) That third count in the said indictment does not conform to section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(i) That fourth count in the said indictment does not conform to section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(j) That the grand jury by which the indictment was found had no legal authority to inquire into the offense charged.

(k) That second count in said indictment is bad, defective, and *duplitious;* that said second count is defective for the reason that there is a misjoinder of

offenses; that more than one offense is charged in said second count of said indictment.

(l) That third count in said indictment is bad, defective, and *duplitious;* that said third count is defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said third count of said indictment.

(m) That fourth count in said indictment is bad, defective, and *duplitious;* that said fourth count is defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said fourth count of said indictment.

While counsel for the defendant appreciate that under section 1024, U. S. Rev. Stat., it is proper to embody offenses of the same kind and of the same class in an indictment, so that the indictment will not be bad upon demurrer for duplicity, yet nowhere has counsel been able to find any authority to the effect that several offenses may be embodied in the same count of an indictment.

It is to be observed that in counts II, III and IV of the indictment the defendants are charged with:

1. Importing and bringing into the United States opium contrary to law.
2. Unlawfully receiving opium contrary to law.
3. Concealing opium contrary to law.
4. Buying opium contrary to law.
5. Selling opium contrary to law.
6. Facilitating in the transportation and concealment of opium contrary to law.

In other words, we have without any question the statement of six distinct and separate offenses contained in each count stated in the conjunctive form. It is to be further noted that under section 387, or the Act of February 9, 1909, chapter 100, 35 Statute Law 614, that the very language as set out in the act and comprising the various offenses is stated in the disjunctive, and that the indictment in this case follows the language of section 2 of the act, using the conjunctive form and charging the defendants with a violation of each and every part of said section. Counsel for the defendant contend that this cannot be done and that there is no authority to the effect that an indictment can be so framed.

In the case of People, appellant, v. Plath, respondent, cited in 166 Cal., page 227, the court on page 229 uses the following language:

> "The indictment before us charged defendant in the conjunctive and in the language of the statute with having on or about * * * As the indictment is drawn, there is no necessary connection between any of the matters so separately charged, and under well settled rules, it would only be necessary for the prosecution to prove, in order to obtain a conviction, that at some time prior to the finding of the indictment the defendant did any one of the things he was alleged to have done. * * *
>
> "* * * The District Court of Appeals in deciding this case said that this blanket form of pleading is not to be commended, but was of the opinion that it was not fatally defective. Of course the

indictment was not fatally defective in the sense that it would be held insufficient to sustain a conviction in the absence of timely objection by demurrer; and it may be that even in the case of the objections urged, if the demurrer had been overruled and a trial had, resulting in conviction, the record on appeal might be such as to satisfy us that the defendant was not prejudiced by the course followed. As to this, we express no opinion, for the question is not before us. The question here is whether the trial court's action in sustaining the demurrer before the trial should be overruled."

Again on page 232, quoting from the opinion of the court, we find:

"We think it is plain that the section was not designed to state a series of acts, all of which taken together should constitute but a single offense, but that it was intended thereby to define at least six separate and distinct offenses and that the situation is precisely the same as it would have been had the subdivisions been enacted as separate sections of our Penal Code, or independent statutes, instead of as subdivisions of a single section, connected with each other by the disjunctive 'or', here as we have seen, defendant was charged in a single indictment and indeed in a single count with having committed the offenses defined in subdivisions 1, 5 and 6, as well as those defined in each of the other subdivisions."

In the case of People v. Lee, 107 Cal. 480, the court said:

"That while many offenses may now be charged, in the strict language of the statute, a defendant

> is still entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense and upon acquittal or conviction plead his jeopardy against further prosecution."

It is to be noted that in the first count of the indictment an overt act of some kind is specifically stated against all defendants except the demurring defendants, Proffitt and Hill; that nowhere in the first count or in any other count is there anything to specifically show the connection of Proffitt and Hill with the matters charged therein, except a general allegation or a blanket statement that they either did buy, sell, secrete, facilitate in transportation, receive contrary to law, opium, and as was said in the case of People v. Webber, 138 Cal. 145-149, the Penal Code under section 952 of said code does not relieve prosecuting attorney from the necessity of informing defendant with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense and upon acquittal or conviction plead his jeopardy against further prosecution.

It is urged on behalf of the defendant, Proffitt, no overt act of any kind being stated against him, or no particular circumstances being stated in the indictment, that he was unable to meet the charge as it now exists and was unable to prepare his defense; that the nature and particulars and the circumstance of his connection with the alleged crime as stated in the indictment are not alleged, and it is therefore respect-

fully submitted that the demurrer as to him should have been sustained.

In urging this contention, counsel do not ignore various decisions which have held that where a statute sets forth a number of acts in the disjunctive such as "making or causing to be made," "keeping or causing to be kept," "cutting and removing," "depositing and causing to be deposited," "making and presenting a claim," or

> "obtaining money from the United States by means of fraudulent deeds, powers of attorney, orders, certificates, receipts or other writings,"

indictments alleging the same in the conjunctive have been held good and with good reason, for in each of the cases so decided a reference is made to a particular transaction or deed, whereas in the indictment here under consideration, as was held in the Plath case (cited *supra*), it was intended by Congress that there should be at least seven separate and distinct offenses, designated in section 2 of the Act of January 17, 1914, commonly called the Opium Act, Ch. 10, 38 Stats. at Large, p. 276, which reads as follows:

> "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such opium, etc."

for the same reasons as alleged in the Plath case.

Assignment No. II is as follows:

The court erred in overruling the objection of the defendant to the questions propounded to the witness Roy B. Holmes, which questions, objections, answers and exceptions are as follows:

"Q. Is that the Baptieste car?

"A. It was, sir.

"Q. Now, who is Baptieste?

"Mr. Dominguez: That is objected to as not cross-examination, as incompetent and immaterial.

"Mr. Lawson: I think it will be very material before we get through, Your Honor.

"The Court: I think it is material. I will overrule the objection.

"A. Well, I can't interpret what you mean by 'who.'

"Q. He was a negro, was he not?

"A. He was a negro that lived somewhere around Central avenue and 10th or 11th street.

"Q. By Mr. Lawson: Now, don't you know that Baptieste was picked up by Proffitt and Hill when he had opium in his possession; that he was taken down to the police station, and that his car was taken away from him and put in your garage?

"Mr. Dominguez: That is objected to as incompetent, irrelevant and immaterial and not proper cross-examination, and I ascribe the question as gross misconduct on the part of the district attorney, the question having but one purpose, and that is to prejudice this jury against the defendant Proffitt on a collateral matter.

* * * * * * * * *

"Q. From whom did you get the car?

"A. Mr. Baptieste or someone called up my office and said their car was in front of a place on Central avenue and wouldn't run, and I says, 'We will be over there as soon as we can.'

"Q. Was Baptieste under arrest at the time?

"Mr. Dominguez: That is objected to as incompetent, irrelevant and immaterial and not cross-examination; and I again ascribe the question of the district attorney as gross misconduct. This question is asked

solely for the purpose of influencing this jury against this defendant Proffitt!"

The grievous injustice from which the defendant suffers under and by reason of this assignment of error will be appreciated by this Honorable Court after having read the testimony of the Chinese witnesses as contained in the bill of exceptions [Tr. pp. 85-200], by whom the Government sought to show that the defendant and another defendant named Hill on the 21st day of February, 1919, at Pasadena (both said defendants being then and there police officers in the city of Los Angeles), pretended to arrest another defendant by the name of Lee Tong, alias Hom Hong, for having opium in his possession, and then and there took from the said defendant, Lee Tong, alias Hom Hong, the sum of four thousand dollars ($4000.00) in money and certain cans of opium and that the defendants, between Pasadena and Los Angeles, released the said Lee Tong, alias Hom Hong, but did not return to him the money or the opium and filed no criminal charge against him.

The assistant United States district attorney, at the trial of this case, offered no evidence to prove that this defendant or any of the other defendants had ever committed any other similar offenses, but in the cross-examination of the witness, Roy B. Holmes, who testified for the defendant, endeavored to get before the jury an accusation to the effect that the defendant and the other said defendant Hill, had pursued exactly the same tactics at some time with a negro named Bap-

tieste. The said assistant district attorney further manifested his intense feeling against the defendant through over-zealousness in endeavoring to convict him, by attempting to and to a large extent actually succeeding in introducing over objections confidential communications that had occurred between the witness, Roy B. Holmes, and his wife, Mrs. Nellie I. Holmes (*the fact that the said incompetent testimony was permitted to be introduced is more thoroughly discussed in the following third assignment of error in this brief*), and in the examination of the said Mrs. Nellie I. Holmes, who appeared as a witness for the Government, the said assistant district attorney asked the said Mrs. Holmes a great many questions pertaining to and concerning the said negro, Baptieste, and his said car. [See Tr. pp. 158 and 159.] That this one assignment of error should cause a reversal in this case should be very apparent to this Honorable Court upon two grounds:

First Ground.

Because it was a deliberate attempt to make a showing before the jury to the effect that the defendant had been guilty of other similar offenses without offering any proof of said offenses and in support of our contention on this point, the attention of this Honorable Court is called to the case of People v. Lee Rial, 23 Cal. App. 713, and to the case of People against James W. Byrnes, 27 Cal. App., p. 79. In these two cases both men were tried for the same offense. Both men had been operating together "fake" pool rooms. In the Rial case evidence of other similar offenses was

introduced and that the other similar offenses *were* offenses was established by competent proof. In the Byrnes case evidence of other similar offenses was introduced but the state was unable to prove that in the other similar offenses the "fake" pool rooms were "fake" pool rooms for the reason that in the Byrnes case the state was unable to locate the exact place where the "fake" pool rooms used in the other similar offenses were located and could therefore not establish the fact that they were not genuine pool rooms receiving bona fide telegraphic reports from some race track, therefore the Rial case was affirmed and the Byrnes case was reversed.

Certainly where no evidence whatever is introduced for the purpose of showing another similar offense, but only an accusation made by the assistant district attorney through his questions, a reversal should be had in this case.

Second Ground.

Because the conduct of the district attorney was such throughout the trial, and particularly was it manifested in these instances, as has repeatedly brought about reversals in this state, notably in the case of People against Mullings, 83 Cal. 138; People against Wells, 100 Cal. 459, and People against Wright, 144 Cal., p. 161, and the court's attention is particularly directed to each of these cases and especially to that portion of the decision in the Wright case beginning at bottom of page 165 (which counsel would quote at length in this brief if time would permit). But the

leading case in this state and one of the leading cases, if not the leading case in the United States, on the subject of misconduct of district attorneys, is found in People against Gorham Tufts, Jr., 167 Cal., p. 266. Closing words in the Tufts case were: "It is to be regretted that prosecuting counsel in the heat of contest and in the desire for victory, sometimes forget that the function of a district attorney is largely judicial, and that he owes to the defendant as solemn a duty of fairness as he is bound to give to the state full measure of earnestness and fervor in the performance of his official obligations. Again and again has this court commented upon the course of prosecutors in this regard, but instances of such conduct are all too common. We have no doubt that in the present case the prosecutor's demeanor and his improper questions deprived the defendant of that fair trial which ought to have been his under the law. For this reason he should not be subjected to the result of a verdict so induced. (Citing People v. Balliere, 127 Cal. 65; People v. Derwae, 155 Cal. 593; People v. Mohr, 157 Cal. 734; People v. Grider, 13 Cal. App. 709.)"

In the Mullings case, in the Wells case, and in the Wright case (cited *supra*), as well as in the Tufts case, the fact that objections were sustained to the improper questions asked by the district attorney, is thoroughly discussed and in each case it is held that the damage was done and the injustice resulted from the improper questions. Therefore on these authorities carefully and conscientiously considered, counsel believes that a reversal should be had in the present

case on this second ground of the second assignment of error, even if there were no other errors complained of.

Assignment No. III is as follows:

The court erred in overruling the objection of the defendant to the questions propounded to the witness Nellie I. Holmes, in reference to a conversation which the witness had with another witness outside the presence of any defendant, which questions, objections, answers and exceptions are as follows:

Question propounded to witness Nellie I. Holmes with reference to conversation and actions of her husband, Roy B. Holmes:

"Q. What did he do when he came home?

"A. Well, he seemed to be terribly excited and—

"Mr. Dominguez: Just a moment: Now, I move to strike that out on the ground it is not responsive.

"The Court: I think it is responsive. Go ahead.

"Mr. Dominguez: Exception. It is hearsay—calling for hearsay.

"Q. By Mr. Lawson: Just proceed, Mrs. Holmes.

"A. He came in and he pulled down all the front curtains—something that never happens only once in six or eight years.

"Mr. Dominguez: Just a moment. I move to strike that out on the ground the same is incompetent, irrelevant and immaterial, without the issues of this case and not binding on either defendant, what Holmes told her.

"The Court: If I remember right, Mr. Dominguez, Mr. Holmes was asked these questions: 'Weren't you excited when you got home?' And, 'Didn't you go in

and pull the curtains down?' and he denied it. Now, if that is so, this evidence is admissible.

* * * * * * * * *

"The Court: The objection will be overruled. Proceed.

"Q. By Mr. Lawson: Just go on now, if there is anything else.

"A. What I mean by 'six or eight years,' I don't think they have ever been pulled down but twice since we were married, and that was twice since this supposed hold-up has happened.

"Mr. Dominguez: I move to strike out the last statement of this witness on the ground that the same is incompetent, irrelevant and immaterial, hearsay, her conclusion and opinion, and ask the court to instruct the jury to disregard that statement.

"The Court: Read the answer.

"The Court: I will overrule the motion to strike out.

"Mr. Dominguez: Exception.

* * * * * * * * *

"Q. Now, I will ask you, Mrs. Holmes, if this conversation did not take place, if not the exact words, in substance?

"Mr. Dominguez: Now, we desire to offer an objection to this question, on the ground that the same is incompetent, irrelevant and immaterial, calling for hearsay evidence outside of the presence of either one of these defendants.

"Mr. Lawson: You understand, Your Honor, this is impeaching testimony.

"The Court: The question you are going to ask her now is the same question you submitted to Mr. Holmes?

"Mr. Lawson: Yes, Your Honor, the same question that was propounded to the witness Holmes. This is purely for the purpose of impeachment.

"The Court: Under those circumstances, Mr. Dominguez, what objection have you got?

"Mr. Dominguez: None. I didn't know his explanation—

"The Court: All right.

"Mr. Dominguez: Of what he intended to do.

"Q. By Mr. Lawson: Mr. Holmes stated, or asked you, Mrs. Holmes, if you remembered a Sunday last February when Mr. Proffitt was at your house, and if you, Mrs. Holmes said, 'Do you mean the Sunday that Hill and Proffitt came while I was taking Hazel to Sunday-school?' Then Mr. Holmes said, 'That is the Sunday that I mean, but Hill was not with Proffitt.' Then you, Mrs. Holmes, said, 'Yes, he was. Don't you remember you told me that that was Hill? And I afterwards told you that Mrs. Merry said, after I described him to her, that he was the same man who came to borrow a gun while we were at Pasadena with the Kesters'. Then Mr. Holmes said to you, Mrs. Holmes, 'No, Hill was not there.' Then you, Mrs. Holmes, said, 'He certainly was.' Then Mr. Holmes said, 'Well, if he was, I didn't know it. I certainly did not see him.' And then Mr. Holmes further said, 'It will be a good thing for you to forget it if you saw him, for Hill is trying to prove that he was sick in bed at the time that they were supposed to have held up those Chinamen.' And then Mr. Holmes further said, 'It may be that you will be called on to be a witness. They had me down there today, and if you are called you just forget that you saw Hill.'

"Now, did that conversation take place between you and Mr. Holmes at that time and place?

"A. Yes, sir.

"Q. In the presence of you and Mr. Holmes?

"A. Yes, sir.

"The Court: She stated the presence.

"Q. By Mr. Lawson: Now, Mrs. Holmes, on the same evening of May 29th, on Thursday night, at your home, in the city of Los Angeles, I will ask you if this conversation did not take place between you and Mr. Holmes, you two being the only parties present at that time. I might further say, did you have a conversation at that time in the house?

"A. Yes, sir.

"Q. I will ask you if this is the conversation that took place at that time: You, Mrs. Holmes, stated to Mr. Holmes that 'You were mixed up with this man Proffitt in opium deals.' And further said, 'Well, I have tried to get you to stay away from them and not mix into police affairs enough, and if you had been at home when you should have been, you would not have had it to say, that is, to testify.' Then Mr. Holmes said, 'I never was mixed up or had anything to do with them.' Then you, Mrs. Holmes, said, 'You certainly did. You seem to know all about that fellow you call Nigger Baptieste.' And then Mr. Holmes said, 'I did not.' Then you, Mrs. Holmes, further said to him, 'Well, I suppose you have forgotten that you told Mr. and Mrs. Schlotzhauer and Mr. and Mrs. Kunkel and myself, that the Nigger's car that the Government was looking for was at your shop, and that they were looking for it all over, and that you knew that there was opium hid in it, and you hadn't looked for it yet, but was pretty sure there was a secret place in the car where the stuff was hid.' Then Mr. Holmes said, 'You are driving me crazy; you always misinterpret things so.' And then Mr. Holmes said to you, 'I told you that the car was in the shop and the Government had looked for it.' Then Mr. Holmes said this to you, 'The car was in the shop, yes, and the Government had looked for it,

but I never mentioned opium.' Then you said to Mr. Holmes, 'You certainly did; and if they ask me to testify, I will ask Grace and Addie, and I bet they will remember it.' And then you further said to Mr. Holmes, 'What about Cockeye Smith? I guess you forget about telling me that you were going to San Diego with the sheriff to get him. And when you got back you told me that you had found him, and had come back by way of Seal Beach, and that you had dinner there about three o'clock; and that you lied to me—you went to San Diego with a couple of women, and I suppose another man.' Then Mr. Holmes said, 'I didn't,' then you said, 'You did.' Then Mr. Holmes said, 'Well, who told you? Addie?' Then you said, 'No, he did not, and it is none of your business who did, but I know you did.' And then Mr. Holmes further said, 'Well, there were two women in the crowd, but they were not with me; they were with the other fellows.' Then you to said to Mr. Holmes, 'I suppose you played chauffeur.' Then Mr. Holmes said, 'Well, you are always picking fights with me. What have I done to bring this on?' Then you said to Mr. Holmes, 'I am not fighting but want you to understand that I won't lie for you or anybody else.' Then Mr. Holmes said, 'I don't want you to, nor nobody asked you to.' Then you said to Mr. Holmes, 'You certainly did just a few minutes ago. You asked me to forget that Mr. Hill was in the car with Mr. Proffitt. I want you to understand that I won't lie. If I am called on to be a witness I will tell the truth if I can remember and be sure, and if I don't remember, I will say so.' Then Mr. Holmes said, 'Well, is there anything good left of me?' And you said to Mr. Holmes, 'Yes, there is. You are the best hearted fellow that ever lived.' And Mr.

Holmes said, 'Is that all?' Then you said, 'When I said that, I mean the bottom of everything. If you would stay at home with your family and go out with decent people and treat my friends as you should everything would go all right every way; but as long as you go with a crowd like you have been, and have nothing to do with your family, you can never expect to be happy, for nobody can make you happy, me or any other woman.' Then Mr. Holmes said, 'Don't worry, there will never be any other woman with me.' Then Mr. Holmes said, 'I only hope that I can fix things inside of thirty days so that my children will never have to go without, and I will get out of the way. There is only one person that I know I can trust, and that is God.' And then you said, 'You had better not be so sure of it, the way you have been living.' Then Mr. Holmes said, 'Nellie, I had a nice surprise for you. Do you know what I am thinking of?' Then you said, 'No.' Then Mr. Holmes said, 'Are you sure?' Then you said, 'Why, yes.' Then Mr. Holmes said, 'Well, I don't know whether to tell you, or not. but believe I will.' Then Mr. Holmes further said, 'I was going to surprise you by putting you in your own home inside of three months from now. I have had a big business proposition offered me, and it is still hanging fire, but if it goes through the least that I will make the first year will be $20,000, and I am still in debt to Charlie Gorton five thousand or seven thousand dollars. I am paying him when I can. And I was going to try to have you in your own home in about three months from now.' Then Mr. Holmes further said he had changed the combination on the safe at the shop, because he couldn't trust Eddie Menier, his foreman, because small amounts of money had been missed, and also a book of Stevens-Duryea parts and a list of Stevens-Duryea owners

which he thought Eddie probably had taken, as he was considering going into business for himself.

"Now, did that conversation take place at that time?

"A. Yes, sir.

"Mr. Dominguez: Just a moment. To which we object on the ground that the same is incompetent, irrelevant and immaterial, calling for hearsay, not tending to prove or disprove any issues in this case, the question asked, and the statement made being purely on collateral matters, and not impeaching or tending to impeach the witness Holmes in any matter to which he testified in this case, bearing upon the issues in the case.

"The Court: Now, if Mr. Holmes had this conversation with this witness, he was interesting himself in the trial of this case, and I think for that reason it is relevant, if that is your only objection.

"Mr. Dominguez: All the objections that I made, if Your Honor please, are in the record. It is incompetent, irrelevant and immaterial and calls for hearsay.

"The Court: The objection will be overruled.

"Mr. Dominguez: Yes, sir. Exception.

"The Court: What is your answer?

"The Witness: Yes, sir.

"Mr. Dominguez: May I at this time, with Your Honor's permission, object to Your Honor's statement that the witness Holmes had an interest in this case?

"The Court: No, I did not say that.

"Mr. Dominguez: Well, pardon me.

"The Court: I said if he stated these things to this witness, it will show that he had interested himself.

"Mr. Dominguez: Pardon me, then, if Your Honor please.

"The Court: That he had interested himself in this case.

"Mr. Lawson: You may cross-examine."

Perhaps the most grievous injustice inflicted upon this defendant was that complained of in this third assignment of error, wherein he was compelled to suffer a conviction that could not but have been caused in very large measure by the introduction of incompetent testimony, for no one may read the testimony of the witness Roy B. Holmes without realizing and appreciating the importance and value of his testimony to the defendant, yet the assistant district attorney in cross-examination [Tr. pp. 138, 139, 140, 141, 147, 148, 149, 150] asked this witness a great many questions concerning conversations that had occurred between him and his wife, Nellie I. Holmes, that by the very nature of the questions showed the confidential character of the communications concerning which he was being interrogated. Then the district attorney put the wife of Roy B. Holmes, to-wit: Nellie I. Holmes, on the stand as a witness [see Tr. p. 153 *et seq.*] and she was permitted to answer over objection of the defendant concerning these very confidential communications and to relate them as they occurred.

Subdivision 1 of section 1881 of the Code of Civil Procedure of the state of California reads as follows:

> "1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or after-

> ward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other; or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife or in an action for damages against another person for adultery commited by either husband or wife."

Under this subdivision of this section, a decision was rendered in the case of People v. Henry Mullings, cited *supra,* 83 Cal. 138, wherein it is held that the word "incompetent" is sufficiently broad to include the ground of objection and the case of People v. Warner, 117 Cal. 637 is to the same effect, while in the case of Humphrey v. Pope, 1 Cal. App. 374, on pages 377 and 378, the court said:

> "It has been repeatedly held that where evidence objected to is absolutely incompetent, the general objection is sufficient. (Nightingale v. Scannell, 18 Cal. 324; Swan v. Thompson, 124 Cal 196; Spelling on New Trial, Section 288.) * * * We can also understand why the specific objection that particular communications between attorney and client, physician and patient, priest and penitent, were privileged, must be urged. But the lips of both husband and wife are forever sealed as to all communications between them during the marital relation, unless consent is shown or the cause of action falls within the exceptions. Neither spouse can be *examined as to*

such communications, without the consent of the other, and in our opinion the evidence is incompetent unless this consent is shown."

In this case the court follows the quotations just cited from its opinion by a discussion of the Mullings case and the Warner case cited *supra,* and adds:

"In other cases the *evidence* is spoken of as competent or incompetent. (Hanson v. Sutter St. Ry. Co., 116 Cal. 116; *In re* Mullen, 110 Cal. 254.)"

In the same decision, the court says:

"The reason of the rule requiring specific objections in said cases is entirely wanting here. The relation being shown, the law absolutely prohibited the examination of the wife touching communication during coverture. (Jones on Evidence, sections 751, 754 and 764). The questions were therefore objectionable from every standpoint and in such case specific objection is not demanded. 'There is no reason for it and where the reason is not present the rule fails.' (Swan v. Thompson, 124 Cal. 196)."

The attention of this Honorable Court is called to Jones' Commentaries on Evidence, by L. Horwitz, Vol. IV, published by the Bancroft Whitney Company in 1914 at page 400, Sec. 733 (751) and the lengthy discussion which follows, covering more than one hundred pages. The able discussion in Jones on Evidence cited *supra,* and the many decisions cited therein, can certainly leave no ground for doubt as to the correctness of the rulings of the California courts above cited.

Assignments Nos. IV, V, VI, VII, VIII and IX are referred to [Tr. pp. 217, 218]; the only argument presented in this brief in connection therewith is made in connection with Assignment No. VI, "The court erred in rendering its judgment in this cause against this defendant for the reason that the testimony did not show or tend to show that the defendant had committed any offense set out or attempted to be set out in the indictment."

Assignment No. VII, "The court erred in rendering its judgment in this cause against the defendant for the reason that the testimony introduced at the trial of said cause did not tend to connect the defendant with the commission of any offense set out in the indictment."

In support of these two assignments, the attention of this Honorable Court is called to the testimony as contained in the transcript on appeal, pages 85 to 200, where the only testimony given by any of the witnesses against this defendant at the most only showed his presence and no guilty act or knowledge on his part in any of the transactions alleged to be violations of law.

We Call the Court's Attention to the Recent Amendment of Section 269 of the Judicial Code, Which, Since the Act of February 26, 1919, Reads as Follows:

> "On the hearing of any appeal, *certiorari,* writ of error or motion for new trial in any case, civil or criminal, the court shall give judgment after

an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

Under this amendment we desire to call the attention of this Honorable Court to the instruction given in this case on the subject of accomplices as contained on pages 69 and 70, transcript of record.

"There are certain rules of law applicable to the testimony of accomplices, which it is proper for the court to give you in charge, and, in doing this I shall adopt the language which has heretofore received judicial sanction.

"An accomplice is a person who, knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense. Whether the testimony of an accomplice be true or false, is a question which, like all controverted question of fact, is submitted solely to your determination. It is not within the province of the court to pass upon controverted questions of fact, or upon questions affecting the credibility of witnesses. But it is the duty of the court to call your attention to certain rules which obtain in courts of justice in reference to these persons known in law as 'accomplices.' On this point you are instructed that a particeps criminis,—that is, an accomplice,—notwithstanding the turpitude of his conduct, is not on that account an incompetent witness. It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the Government has a right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an

accomplice is, however, always to be received with caution, and weighed and scrutinized with great care by the jury; and it is usual for courts to instruct juries,—and you are instructed in this case,—that you may disregard the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his evidence connecting the defendants with the crime, by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be virtually to exclude him, inasmuch as the confirmatory evidence proves, of itself, those parts to which it applies. If he is confirmed in material parts connecting the defendants on trial with the offenses charged in the indictment, he may be credited in others; and the jury will decide how far they will believe a witness from the confirmation he receives by other evidence; from the nature, probability, and consistency of his story; from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth.

"If you should believe from the evidence that any witness who was called by the defendants and testified in their behalf was an accomplice in the commission of the crime or crimes charged in the indictment, then the same rules I have stated to you as being applicable to such witnesses called for the Government are alike applicable to such witnesses called for the defense."

We do not believe that this is the true law with regard to the testimony of accomplices; as we understand it, in the state of California the true law is set forth in the case of Stone v. State, as reported in the American State Reports, Vol. 98 (note), page 169, as follows:

"A test is suggested in Welden v. State, 10 Tex. App. 400, and the same is approved by the Supreme Court of California in the recent case of People v. Morton, 139 Cal. 719, 73 Pac. 609. The following is an extract of the opinion of the Texas case: 'In order to convict the defendant upon the testimony of an accomplice, there must be other evidence tending to connect the defendant with the offense. The accomplice must be corroborated by the evidence of some other witness, and this corroboration must be by proof of some fact tending to connect the defendant with the commission of the offense. The accomplice may state any number of facts, and these facts may be corroborated by the evidence of other witnesses; still, if the facts thus corroborated do not tend to connect the defendant with the crime, or if they do not point pertinently to the defendant as the guilty party, or as a participant, this would not be such a corroboration as is required by the code. We suggested this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with a view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.' See, too, People v. Ames, 39 Cal. 403."

Still further in support of our contention that this is the true rule, we call attention to the case of People

v. Robbins, 171 Cal. 466, and that our contention in this regard is sound, we believe, is sustained by the able discussion in Vol. 1, Ruling Case Law, page 168, and 169.

In closing this brief, we respectfully submit that if the evidence of those who were accomplices in the crime committed, if a crime was committed, is excluded, there is absolutely no evidence tending to connect this defendant with the commission of any offense.

Respectfully submitted,

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